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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947-1948

No. 793 54

HOWARD F. CORAY, ANCILLARY ADMINISTRATOR OF THE ESTATE OF WILLIAM FRANK LUCUS, DECEASED,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 793

HOWARD F. CORAY, ANCILLARY ADMINISTRATOR OF THE ESTATE OF WILLIAM FRANK LUCUS, DECEASED,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Howard F. Coray, Ancillary Administrator of the Estate of William Frank Lucus, deceased, respectfully shows:

Summary and Short Statement of Matter Involved

The Supreme Court of Utah, in a three to one decision, denied petitioner his right of trial by jury guaranteed by the Constitution in an action arising under the Federal

Employers' Liability Act and the Federal Safety Appliance Act, where the evidence clearly demonstrated that respondent violated the Safety Appliance Act and that such violation, in part at least, caused decedent's death. Respondent admitted that it hauled and permitted to be hauled in interstate commerce PFE Car 29435 and that said car was equipped with a defective automatic air brake. It was stipulated "that it (the train) stopped because the triple union nut became disconnected from the triple valve on PFE Car 29435 due to the threads on the triple valve being worn" (R. 34). The failure of the triple valve permitted the air in the brakeline to escape to the atmosphere, thus causing the air brakes on the whole train to set at once in emergency. This brought the moving train to an unexpected, undesired, abrupt and sudden stop (R. 22-24). Within seconds thereafter a single man motor driven track car, upon which deceased, William Frank Lucus, respondent's signal maintainer, was riding, came into a violent rear end collision with the train and Lucus was killed.

Contrary to the will of Congress as expressed in the Federal Safety Appliance Act and the Federal Employers' Liability Act, Sections 1, 8, 9 and 51, Title 45, U. S. C. A., and to the holdings of this Court in controlling decisions construing said Acts, the trial court granted respondent's motion for a directed verdict of "no cause of action." The Utah Supreme Court affirmed on three grounds: (1) that there was no evidence which would justify a jury in finding that respondent's violation of the Federal Safety Appliance Act, either in whole or in part, caused the injury and death of Lucus; (2) that the "legal" cause of the death of Lucus was his own negligent act; (3) that the Federal Safety Appliance Act was not passed for the purpose of furnishing protection to an employee in the position and situation of Lucus immediately prior to the fatal collision.

Petitioner contends that in reaching this result the trial court and Supreme Court of Utah disregarded the controlling principles of law announced by this Court in *Spokane & I. E. R. Co.* v. *Campbell*, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125; *Grand Trunk Western R. R. Co.* v. *Lindsay*, 233 U. S. 42, 34 S. Ct. 581, 58 L. Ed. 838; *Louisville & Nashville R. Co.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931; *Union Pac. R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751; *Brady* v. *Terminal R. Assn. of St. Louis*, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614; *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446; *Anderson, Admx. of the Estate of L. C. Bristow, dec.* v. *The Atchison, Topeka and Santa Fe Ry. Co.* (decided April 26, 1948), not yet officially reported, but published in 16 L. W. 4375, reversing S. Ct. of California, 187 P. (2d) 729; *Minneapolis St. P. & S. S. M. Ry. Co.* v. *Goneau*, 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335; *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528; *Minneapolis & St. Louis R. R. Co.* v. *Gotschall*, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995; *White* v. *Central Vt. R. Co.*, 238 U. S. 537, 35 S. Ct. 865, 59 L. Ed. 1446. The Utah District Court and Supreme Court rulings are also in conflict with the following United States Circuit Court decisions: *Eglsaer* v. *Scandrett*, 151 F. (2d) 562 (7 C. C. A. 1945); *Philadelphia & R. Ry. Co.* v. *Auchenbach*, 16 F. (2d) 550 (3 C. C. A. 1927), Cert. Den. 273 U. S. 761, 47 S. Ct. 476, 71 L. Ed. 878; *McCarthy* v. *Pennsylvania R. R. Co.*, 156 F. (2d) 877 (7 C. C. A. 1946) Cert. Den. 329 U. S. 812, 67 S. Ct. 635; *Southern Pacific Co.* v. *Ralston*, 67 F. (2d) 958 (10 C. C. A. 1933); *Pennsylvania R. R. Co.* v. *Cole*, 214 F. 948 (6 C. C. A. 1914); *Ander-*

son v. *Baltimore & O. R. Co.*, 89 F. (2d) 629 (2 C. C. A. 1937), Cert. Den. 402 U. S. 696, 58 S. Ct. 14, 82 L. Ed. 538.

In cases above cited this Court has declared that there can be, as matter of law and fact, a multiplicity of causes in any accident and that if any one of such causes is the result of the negligence or unlawful conduct of the carrier, an injured employee may recover under the Federal Employers' Liability Act.

The Utah Court refused to recognize or properly construe and apply that provision of the Federal Employers' Liability Act which grants remedy for injury sustained by an employee *resulting in whole or in part from the negligence or unlawful conduct of the carrier.* The Utah Court ruled that, as matter of law, there can be but one "legal" cause of an accident, which precludes any and all other causative factors from being considered as causing, either "in whole or in part" the injury or death complained of. By its holding the Utah Supreme Court has eliminated the significant phrase "in whole or in part" from the Federal Employers' Liability Act. The Utah Court's decision herein deprives railroad workers of substantial benefits and rights and takes from them a large portion of the relief granted them by Congress.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code, as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. A. Section 344.

(b) The Statutes of the United States applied by the Supreme Court of the State of Utah are 45 U. S. C. A., Sections, 1, 8, 9, 51 and 53; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(c) The judgment of the Supreme Court of Utah was rendered on October 31, 1947. It is set forth at (R. 97), is not yet officially reported in the Utah Reports, but appears at 185 P. (2d) 963. The petition for rehearing was denied February 10, 1948 (R. 98). This petition for certiorari was filed May 10, 1948.

Questions Presented

The questions presented are whether the Supreme Court of Utah properly applied the Federal Safety Appliance Act and the Federal Employers' Liability Act, or whether the rulings and applications made by it are inconsistent and in conflict with controlling decisions of this Court. The Utah Court held in this case that petitioner was not entitled to have the issues of his cause submitted to a jury because: (a) the admitted violation of the Federal Safety Appliance Act by respondent, as matter of law, did not, either in whole or in part, cause the death of Lucus; (b) the "legal cause" of the death of Lucus, as a matter of law, was his own negligent act; (c) Lucus was not a person for whose protection the Safety Appliance Act was passed, and, therefore, respondent's admitted violation of the Act could not impose liability for his death.

Reasons Relied On for Allowance of Writ

The Supreme Court of Utah has decided a Federal question of substance and importance in a way not in accord with controlling decisions of this Court. It has refused to allow a jury to pass upon substantial questions of fact relating to causation where the evidence and reasonable inferences adequately supported petitioner's claim. The Supreme Court of Utah has abdicated its sworn duty to protect petitioner in the enjoyment of his right of trial by jury guaranteed by the Constitution. It has usurped the

functions of the jury contrary to the repeated admonitions of this Court. It has allowed, sanctioned and permitted, and by its decision has made the outlawed defense of contributory negligence a complete bar to recovery in an action arising under the Safety Appliance Act and the Federal Employers' Liability Act, and has deprived the petitioner of substantial rights and benefits conferred by the Federal Safety Appliance Act and the Federal Employers' Liability Act.

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act and Federal Safety Appliance Act in Utah, and specifically to determine whether or not the Utah Supreme Court will be permitted to construe and apply the Federal Employers' Liability Act and Federal Safety Appliance Act in a manner contrary to the decisions of this Court and other Federal Courts construing them as it has done in the past. See *Ehalt* v. *McCarthy, et al.*, (1943), 104 Utah 110, 138 P. (2d) 639; *Pauly* v. *McCarthy, et al.*, 109 Utah 398, 166 P. (2d) 501, reversed by this Court in 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261; *Wilkerson* v. *McCarthy, et al.*, 187 P. (2d) 188; and the decision of the Utah Court in this cause.

Prayer

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said Court to certify and send to this Court a transcript of the record in the case entitled *Howard F. Coray, Ancillary Administrator of the Estate of William Frank Lucus, deceased, Plaintiff and Appellant*, v. *Southern Pacific Company, a corporation, Defendant and Respondent*, No. 6967, including also the proceedings in said Supreme

Court, to the end that said cause may be reviewed and determined by this Court and the judgment of the Supreme Court of Utah reversed and the cause remanded for jury trial in accordance with law.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

The decision of the trial court was made and entered on the 6th day of April, 1946. The Opinion of the Supreme Court of Utah as set forth at R. 79 to 97, is not yet officially reported in the Utah Reports but appears at 185 P. (2d) 963.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Supreme Court of Utah was rendered on October 31, 1947 (R. 97). Petition for Rehearing was denied on February 10, 1948 (R. 98). Petition for Writ of Certiorari was filed on May 10, 1948. The judgment of the Supreme Court of Utah is based on its application of the United States Statutes commonly called the Federal Safety Appliance Act and Federal Employers' Liability Act, 45 U. S. C. A., Secs. 1, 8, 9, 51 and 53. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A., Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A., Sec. 350.

Statement of the Case

William Frank Lucus, an employee of respondent, 39 years of age at the time of his death, was fatally injured while engaged in the performance of his duty as a signal maintainer on the main line track of respondent at a point approximately 3600 feet east of the east switch at Lemay, in Box Elder County, Utah, on the afternoon of the 24th day of May, 1944. Howard F. Coray, ancillary adminis-

trator, filed suit in the District Court of Weber County, Utah, and following trial before a jury the trial court granted respondent's motion for directed verdict of no cause of action and judgment was entered accordingly (R. 12, 13).

Respondent was charged with operating its eastbound freight train, First 582, consisting of 82 freight cars, a caboose and an engine, in violation of the Federal Safety Appliance Act,[1] in that it hauled and permitted to be hauled and used in interstate commerce PFE Car No. 29435 at a time when the threads on the triple valve were so badly worn that the triple union nut became disconnected from the triple valve, allowing the air in the brakeline to escape to the atmosphere, thus causing the automatic air brakes on each car in the train to be set at once in emergency, bringing the moving train to an unexpected, undesired, abrupt and sudden stop; that seconds after the stop the track car, upon which deceased was riding, violently collided with the rear end of the train, causing his death.

There was no particular conflict in the testimony. The evidence conclusively demonstrated that respondent was guilty of the charged violation of the Safety Appliance Act. It was stipulated that the train stopped because the triple union nut became disconnected from the triple valve on PFE Car 29435 due to the threads on the triple valve being worn (R. 34). This caused the air in the train line to escape to the atmosphere, immediately setting the automatic air brakes on all of the cars in the train in emergency, bringing the train to an abrupt, undesired and sudden stop. Within seconds of the stop the track car, upon which decedent was riding, crashed into the rear end of the train.

Darrel E. Jorgensen was the conductor on respondent's eastbound Train First 582 at the time of the accident (R. 21). His orders were to take the train onto the siding east

[1] The pertinent sections of the Federal Employers' Liability Act, and of the Federal Safety Appliance Act are set forth in Appendix "A".

of Newfoundland and permit westbound passenger train Fifth 87 to go by and eastbound passenger Train 28 to pass (R. 21, 22). At the time of the accident the crew was "making a run" for the siding (R. 22). When First 582 reached a point about 3600 feet east of the east switch at Lemay, the triple valve of the PFE car failed and the train was thereby brought to an unexpected emergency stop (R. 22-24).

Alvin O. Lynch testified that he was riding on the track car with deceased at the time of the accident; that he first met Lucus at about 1:00 or 1:30 p. m.. that day and was going to take over the signal maintaining job at Lemay, and that he was not acquainted with the job, nor his territory (R. 46, 47). That afternoon Moss, the boss, told him to go with Lucus and look the territory over. They were traveling on a one-man flat-top motor car (R. 47); he was sitting on the south side and Lucus on the north. Lucus was running the car. They traveled east on the north siding to the east switch and there waited until First 582 went by. They then placed the car on the eastbound main line track and proceeded eastward behind the train (R. 48, 49). The rear end of the freight train was then three or four hundred yards away. After Lynch boarded the car he turned his back to Lucus and saw him no more and no conversation passed between them. The purpose of his trip was to familiarize himself with the signals. He never noticed the train after the track car was placed in motion. He thought they had traveled about one-half or three-fourths of a mile when the accident occurred. He did not know what the speed of the car was, but did not think the speed excessive (R. 50).

While the car was traveling he was looking west toward the block signals to see when they cleared. He stated (R. 53):

> "It cleared after that train passed the battery cut west of Lemay. There is a train going west and one

coming east. We were following the eastbound. I was watching the signal this westbound train was holding" (R. 53).

It is a fair inference that Lucus likewise directed his attention toward the block signal. He was looking toward the west when first observed by Jorgensen (R. 24).

When the track car came into collision with the rear end of the train Lucus was thrown clear of the car and off to the north of the tracks; he was dead when picked up.

Jorgensen was of the opinion that the train was traveling between 25 and 30 miles per hour at the time the brakes were set in emergency by the failure of the triple valve on the PFE car (R. 26). He stated that when he first saw the track car it was in the neighborhood of ten car lengths or about 500 feet behind the train (R. 24).

Jorgensen testified that when the train started to stop, "I looked up and saw that we didn't have any air in the caboose gauge and I turned to the back of the train and saw this motor car coming and Anderson said 'Good God Swede those guys aren't going to get stopped' and we went out to the back and tried to stop them" (R. 23).

Brakeman Agricola testified (R. 44):

> "Q. How much time had elapsed between the time when Anderson said something about 'We are going to get hit' and the time when you did get hit?
>
> "A. Well, it wasn't much time, I would say seconds" (R. 44).

At the conclusion of the presentation of the evidence respondent made a motion for a directed verdict, the pertinent parts of which are set forth in footnote.[2]

[2] "Comes now the Defendant, Southern Pacific Company, after each of the parties have rested, and moves the Court for an order directing the jury to return its verdict in favor of the defendant and against the plain-

The District Judge granted the motion and stated (R. 12):

> "It is the opinion of the court that Mr. Lucus—one who was in the position he was in at the time of the accident, the Act didn't apply to him" (R. 12).

The Utah Supreme Court affirmed on the first, second and fourth grounds stated in the motion.

Specification of Errors

The Supreme Court of Utah committed prejudicial and reversible error in affirming the trial court's judgment on the directed verdict of no cause of action for the following reasons:

1. The respondent's admitted violation of the Federal Safety Appliance Act was a violation of duty to its employee, William Frank Lucus, as matter of law.

2. Respondent's admitted violation of the Federal Safety Appliance Act "in whole or in part" caused the death of William Frank Lucus.

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tiff, no cause of action, for the following reasons and upon the following grounds:

"First: That there is no evidence in the record which would justify a finding by a jury that anything done or omitted by the defendant caused or contributed proximately to the injury and death of William Frank Lucus.

"Second: The evidence establishes, without conflict and as a matter of law, that the sole proximate cause of the death was the inattentive and careless manner in which Lucus drove and operated the motor car in question.

. . . . . .

"Fourth: It appears, as a matter of law, that the disconnection of the triple union nut from the triple valve was not a contributing cause or the cause of the collision at the rear end of the train, and further, that the Safety Appliance Act in question was not passed for the purpose of furnishing protection to one in the situation in which Frank Lucus was employed and engaged at the time of the rear-end collision" (R. 10, 11).

3. In eliminating respondent's admitted violation of the Federal Safety Appliance Act as a causative factor and determining the cause of Lucus' death as matter of law, the Utah courts have usurped the functions of the jury.

ARGUMENT

Point I

Respondent's admitted violation of the Federal Safety Appliance Act was a violation of duty to its employee, William Frank Lucus, as matter of law.

It is conceded in the decision of the Utah Supreme Court that respondent was in violation of the Federal Safety Appliance Act at the time of the accident resulting in Lucus' death. The court further concedes and states that a violation of the Federal Safety Appliance Act imposes liability upon a carrier for any injury to an employee caused, in whole or in part, by such violation. The court then goes on to hold that there was no breach of duty by respondent toward its employee, William Frank Lucus, because the requirement of the Safety Appliance Act, that all trains be equipped with safe and proper air brakes, is for the protection of employees on moving trains and not to protect against injury from standing trains. We quote from the opinion (R. 88):

> "• • • The provisions of the act are for the purpose of protecting those—the crew of the train and others, whose safety would be endangered if the train could not be stopped; not of protecting other employees because the train was stopped by the brakes." (R. 88)

And again

> "• • • But the objective of the statute, insofar as brakes might be concerned, is not to protect employees from standing, but from moving trains." (R. 88)

We do not hesitate to state that this holding stands alone amongst authorities and represents all that is extreme, narrow and unreasonable in the interpretation and application of these Federal Acts, and that it is contrary to the spirit of all controlling decisions. Long and diligent search has failed to expose any other decision which has gone to the ridiculous extremes reached here. The United States Supreme Court has held that close and doubtful cases should go to the jury.

In this case, where there can be no real doubt as to the existence of a closed causal connection between the admitted violation of the Act and the death, the Supreme Court of Utah resolved the questions of liability as matters of law. Consider the following language of this Court in the case of *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 63 S. Ct. 347:

> "The Act, like the Safety Appliance Act, 45 U. S. C. A. Sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment."

In that case this Court sustained a judgment for the plaintiff and in so doing reversed the Appellate Court of the State of Illinois where it appeared that decedent fell from the tender of a locomotive due to ice on the deck and plaintiff was completely unable to show or prove that the ice upon the deck was there as a result of any negligent act or omission on the part of the railroad company.

The basic ruling of the court herein is much narrower and more unreasonable than the rule which respondent urged the United States Supreme Court to adopt in the *Lilly* case to the effect "* * * that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter." The Court recognized and disagreed with

the contention of respondent in that case as being one which sought a narrow and constricted interpretation and application of the Act. It is respectfully submitted that the Utah court has adopted a view here which does violence to the repeated admonition of this Court that the Safety Appliance Act is to be liberally construed in the light of its prime purpose to afford protection to employees and others.

In *Louisville & Nashville R. Co.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931, the essential facts were: A train of many cars, standing on a switch track, was separated by about two car lengths from five loaded coal cars on the same track. An engine, pushing a stock car ahead of it, came onto the track and failed in an attempt to make a coupling with the five cars, but struck them with such force that the five loaded cars were driven over the intervening space and into violent collision with the standing train and plaintiff, who was on one of the five cars for the purpose of releasing the brake, was thrown to the track and injured. Plaintiff based his suit upon an alleged violation of the Coupler Act. Defendants contended that the violation was not available to plaintiff because he was not engaged in a coupling operation at the time of his injury. This Court sustained plaintiff and stated (37 S. Ct. 457):

> "• • • The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty."

In *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U. S. 10, 58 S. Ct. 426, 429, 82 L. Ed. 614, the plaintiff brought an action under the Federal Safety Appliance Act to recover for injuries received by him; he was not an employee of the defendant, but received his injuries while inspecting cars in defendant's yards which were to be subsequently delivered to his employer. The defendant claimed that plaintiff was not entitled to the protection of the Act because he was not its employee at the time of the injury. This Court sustained plaintiff's contention holding that he came within the protection of the Act.[3]

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[3] "• • • We have said that 'the nature of the duty imposed by a statute and the benefits resulting from its performance' usually determine what persons are entitled to invoke its protection. It was in this view that we held that the power brakes required by the Safety Appliance Act were not only for the safety of railway employees and passengers on trains but also travelers on the highways at railway crossings.' Fairport, P. & E. R. Co. v. Meredith, 292 U. S. 589, 596, 597, 54 S. Ct. 826, 829, 78 L. Ed. 1446. In the instant case, petitioner in the course of his duty would have occasion to go upon the cars and use the grab-iron, and accordingly the benefit of the statute would extend to him, although he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work. His work was that of inspection to discover defects of the sort here found to exist as well as others.

"This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous. St. Louis, Iron Mountain & S. Rwy. Co. v. Taylor, 210 U. S. 281, 295, 28 S. Ct. 616, 52 L. Ed. 1061; Chicago, Burlington & Quincy Rwy. Co. v. United States, 220 U. S. 559, 570, 31 S. Ct. 612, 55 L. Ed. 582; Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 620, 621, 37 S. Ct. 456, 457, 61 L. Ed. 931; Great Northern Railway Co. v. Otos, supra. The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. Southern Railway Company v. United States, 222 U. S. 20, 32 S. Ct. 2, 56 L. Ed. 72. Laying down this comprehensive rule as a matter of public policy, Congress has made no exception of those employed in inspecting cars. The statute has been liberally construed 'so as to give

In *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 596, 597, 54 S. Ct. 826, 829, 78 L. Ed. 1446, this Court held that the power brakes required by the Federal Safety Appliance Act were not only for the safety of railway employees and passengers on trains but also travelers on the highways at railway crossings.

Unexpected, unscheduled and sudden stops, such as occurred in this case, increase the dangers of railroading. Such stops are not only dangerous to employees riding upon the stopping train, but to employees who may be required, in the performance of their duties, to travel upon the same tracks in the wake of such trains. It would be absurd to claim that rear end collisions are not a common type of railroad accident. Several cases which have arisen out of rear end collisions are cited in this brief. See *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751. The unexpected, unnecessary and sudden stop of First 582 was caused by the respondent's admitted failure to obey the Federal Safety Appliance Act and respondent became liable in damages to every employee suffering injury caused, in whole or in part, by such violation. On this point the Act is explicit and apparently there is no authority to the contrary. At least, the Utah court was unable to find a single decided case to support its strange and labored conclusion.

It is respectfully submitted that the Utah Supreme Court's decision withholding from decedent the protection

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a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the act.' Swinson v. Chicago, St. P. M. & O. Rwy. Co., 294 U. S. 529, 531, 55 S. Ct. 517, 79 L. Ed. 1041, 96 A.L.R. 1136. In Davis v. Wolfe, 263 U. S. 239, 243, 44 S. Ct. 64, 66, 68 L. Ed. 284, reviewing the earlier cases, the court held that one can recover 'if the failure to comply with the requirements of the Act is a proximate cause of the act resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection" (58 S. Ct. 429).

of the Federal Safety Appliance Act is without support in reason or legal precedent and should be reversed.

Point II

Respondent's admitted violation of the Federal Safety Appliance Act "in whole or in part" caused the death of William Frank Lucus.

The following quotation from the Utah Court's decision reveals its misunderstanding of the legal concept of causation under the Federal Employers' Liability Act and Federal Safety Appliance Act (R. 86, 87):

> "This is not to say that a defect in the air line which causes the air to be released and the train to be brought to an emergency stop, may not be *the legal cause of injuries resulting to an employee.* Clearly, it may. Thus, in Minneapolis & St. Louis R. R. Co. *v.* Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995, where a brakeman, walking along the top of a train of cars was thrown off and killed, when the train separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk; it could not well be said that the failure of the coupler was not *the legal cause of the brakeman's death.* Likewise, in the case of Chesapeake & Ohio Ry. Co. *v.* Smith, 42 F. 2d 111, cited by appellant. There the train came to an emergency stop of such violence that it threw the brakeman through the panel of the front door of the caboose, and tore loose the furniture and stove. In such case the immediacy of the result *leaves no room for speculation as to its cause.*
>
> "But here, the stopping of the train—whether because of the defect in the triple valve, or a proper application of the braking power—was but the creation of a condition upon which the negligence of plaintiff's intestate operated. It was not *the legal cause of the result.* Had the train been intentionally stopped because of a defective appliance, and the same eventuality

had transpired, could it be found that the railroad's violation of the Safety Appliance Act *was the legal cause of the death* of plaintiff's intestate? Had the engineer of the train noticed a 'hot box' and had brought the train to a stop in order to have it remedied, and the track car collided with the train, the defective journal box would have been *the cause of the stop,* but that cause produced a non-negligent condition; that is, a condition or situation which of itself violated no duty owing to the men on the following track car.

"Viewed from the standpoint of negligence, the railroad company was not negligent toward plaintiff's intestate *in failing to comply with the Safety Appliance Act relative to the locomotive furnished to the crew of the train.* Viewed from the standpoint of causation: Looking back from the harm to the actor's negligent conduct, it appears highly extraordinary that the negligent conduct should have brought about the harm. See Restatement of the Law of Torts, Negligence, Sec. 433." (Italics ours)

The Utah court's frequent use of the phrase "legal cause" illustrates what petitioner conceives to be the fundamental and basic error of the court's decision. The Utah Supreme Court in this decision refuses to recognize and give meaning to the significant words of the Federal Employers' Liability Act "in whole or in part." It refuses to accept the realistic concept that accidents can, and usually do, have a number of causes. The concept of multiplicity of causes implicit in the words "in whole or in part" has been repeatedly sanctioned and applied both by this Court and by the circuit courts. The Utah court's resurrection of the absolute defense of contributory negligence by calling such conduct the "legal cause" is contrary to every Federal authority petitioner has been able to discover. The phrases "legal cause" and "proximate cause" are foreign to the Federal Acts in question; neither phrase is used in any section of the Acts. They are used and em-

ployed by the Utah court to obscure reason and justify a result not otherwise obtainable. The train was brought to a sudden, unexpected stop by an admitted violation of the Federal Safety Appliance Act, and the track car following the train thereupon crashed into it and an employee was killed. The Utah court removes the violation as an "in whole or in part" cause of the death by a confusing play on these meaningless phrases. The accomplishment of the Utah court in thus eliminating the violation of the Act as a cause is nothing short of an act of judicial legerdemain.

The Utah Supreme Court cites but one authority in support of its holding, *i.e.*, the American Law Institute, Restatement of the Law of Torts, Vol. II, and it is submitted that this authority does not support the reasoning of or the result reached by the Utah court, but on the contrary supports the contention of petitioner herein. In Section 433 the Institute enumerates four considerations to be used in determining cause. First: "*The number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it.*"

There were but two factors which contributed to the cause of Lucus' death; both are substantial: (1) Respondent's admitted violation of the Federal Safety Appliance Act which brought the train to an unexpected and sudden stop. (2) The failure of decedent to maintain a lookout ahead.

Petitioner's action being founded on respondent's violation of the Federal Safety Appliance Act, factor number 2 is removed from consideration by the express terms of the Federal Employers' Liabilty Act.

Second: "*Whether after the event and looking back from the harm to the actor's negligent conduct, it appears highly extraordinary that it should have brought about the harm.*"

Viewing the stage as it was set immediately following the failure of the triple valve, the collision between the train and track car was practically inevitable. The unexpected

and sudden stop of the train created a dangerous situation. The collision was inevitable because of the fact that the men on the track car were engaged in watching the block signals. They had no reason to expect the train to stop when and where it did and they, therefore, failed to make a timely discovery of it. For a very pertinent analysis and comment supporting petitioner's contentions, see the "Comment on Clause (b):" page 1167 of the American Law Institute, Restatement of the Law of Torts, Vol. II, Sec. 433.

Third: "*Whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other force for which the actor is not responsible.*"

This is not a case where there is a chain of causation operating through a number of forces. The collision occurred directly and immediately following the unexpected stop of the train. Unless the distance separating the track car and the rear of the train was sufficient for Lucus to stop the track car, a collision was made inevitable by the stop, and even if the distance was sufficient the danger was ever present that he would not discover the stalled train in time.

Far from creating a situation harmless, the unexpected stop of the train under the circumstances here present created a situation fraught with great and immediate danger to decedent.

Fourth: "*Lapse of time.*"

The lapse of time between the failure of the triple valve and the collision was a matter of seconds only. There was certainly no time for new and independent causes to intervene.

A close and careful examination of the Utah Supreme Court's only authority, as we have demonstrated, can lead to but one conclusion, *i.e.*, that respondent's violation of the Federal Safety Appliance Act was a substantial causative

factor in the accident resulting in the death of Lucus, and, therefore, "in whole or in part" caused his death.

In the leading case, *Spokane & Inland Empire Railroad Co.* v. *Campbell*, 241 U. S. 497, 36 S. Ct. 683, 689, 60 L. Ed. 1125, this Court, speaking through Justice Pitney, stated:

> "Upon the whole case, we have no difficulty in sustaining his right of action under the employers' liability act. That act (Sec. 1, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, Sec. 8657) imposes a liability for injury to an employee 'resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, * * * or other equipment.' As was held in San Antonio & A. Pass R. Co. *v.* Wagner, decided June 5, 1916, 241 U. S. 476, 60 L. Ed. —, 36 Sup. Ct. Rep. 626, a violation of the safety appliance act is 'negligence' within the meaning of the liability act. And by the proviso to Sec. 3 of the latter act, no employee injured or killed shall be held to have been guilty of contributory negligence in any case where a violation of the safety appliance act 'contributed to the injury or death of such employee.' It is too plain for argument that under this legislation the violation of the safety appliance act need not be the sole efficient cause, in order that an action may lie. The circuit court of appeals (133 C. C. A. 370, 217 Fed. 524) held that the element of proximate cause is eliminated where concurring acts of the employer and employee contribute to the injury or death of the employee. We agree with this, except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause. But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the safety appliance act are concurring proximate causes, it is plain that the employers' liability act requires the former to be disregarded."

In the above case the court considered a situation where an engineer, in disregard of written orders, took his train onto a track over which another train was then approaching from the opposite direction. The jury, in answer to special interrogatories, found:

(1) That Campbell received orders which did not permit him to proceed onto the track where he was injured.

(2) That the air brakes on his train were defective.

(3) That Campbell's violation of orders proximately caused the accident.

This Court affirmed a judgment in favor of plaintiff, and in speaking of finding (3), said:

> "* * * From the fact that he disregarded and in effect violated the order as actually communicated to him, it, of course, does not necessarily follow that he did this wilfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence on his part, and not a departure from the course of his employment" (36 S. Ct. 683, 689).

How much less blameworthy was the conduct of Lucus, who was following a train which he had every reason to believe would continue on its way until it reached a station or a siding.

Another factor bearing on the conduct of Lucus was the nature of his duties under his employment. He was a signal maintainer and it was not only a matter of great con-

cern and interest to him to observe the operation of the block signals as actuated by both eastbound and westbound trains, but a matter of duty under his employment as well. Lynch, the new signal maintainer, testified that his attentions were focused on the block signals watching to see when they changed. A jury would be fully justified in finding that Lucus' attention was likewise absorbed by the operation of the signals. Decedent was certainly not skylarking or indulging in horseplay at the time of the collision. But it would, however, seem entirely unprofitable to examine the nature of Lucus' conduct. It could amount to nothing more than contributory negligence, which is completely immaterial here.

It was through the respondent's violation of the Federal Safety Appliance Act that the track ahead became blocked at a time when Lucus had every right to expect it to be clear. It is impossible for petitioner to discover any way in which respondent's admitted violation of the Federal Safety Appliance Act can be eliminated as a substantial causative factor in the resultant accident or by which decedent's conduct can become the sole proximate cause thereof.

In its consideration of the case, the Supreme Court of Utah must have completely ignored the reasoning of this Court in *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 319, 62 L. Ed. 751. There defendant sought to avoid liability for the death of one of its employees on the ground that it conclusively appeared from the evidence that the employee remained in the caboose of the stalled train when his duty required him to proceed back along the track to protect by flagging. But for his own negligent failure in the performance of duty his death would not have occurred. Justice Holmes replied to this argument in the following language:

> "But it is said that, in any view of the defendant's conduct; the only proximate cause of Cradit's death

was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another when, if it had done its duty, neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practicel unit rather than inquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road" (38 S. Ct. 319).

To like effect see: *Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528.

The answer to the Utah Supreme Court's holding that the stopped train was merely a condition and, therefore, respondent's violation of the Federal Safety Appliance Act ceased to be a concurring cause is found in the opinion of this Court in the case of *Grand Trunk Western R. Co.* v. *Lindsay*, 233 U. S. 42, 34 S. Ct. 581, 583, 58 L. Ed. 838. In that case the plaintiff, a switchman, was attempting to make a coupling. The couplers failed to couple on impact and several unsuccessful attempts followed. Thereupon plaintiff went between the cars to ascertain, and, if possible, remedy the trouble. While he was between the cars the engineer started the engine and plaintiff was injured. Discussing the problem of causation this Court, speaking through Chief Justice White, stated:

"* * * But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of

> the railway company to comply with the safety appliance act and by the contributing negligence of the switchman in going between the cars" (34 S. Ct. 583).

The decision of the Utah Court on the matter of causation is contrary to all the decisions we have discovered from the Circuit Courts. In several recent cases the Circuit Courts have had occasion to discuss and pass upon the legal concept of causation under the Federal Employers' Liability Act, and especially upon the meaning of the phrase "in whole or in part" as those words are used in the Act.

In discussing contributory negligence set up as sole proximate cause under the Federal Safety Appliance Act, the Third Circuit Court of Appeals in *Philadelphia & R. Co.* v. *Auchenbach*, 16 F. (2d) 550, 551, 552, Cert. Den. 273 U. S. 761, 47 S. Ct. 476, 71 L. Ed. 878, stated:

> "If his act amounted to negligence it was no more than contributory negligence which was removed from consideration by the Act. Chicago G. W. R. R. Co. *v.* Schendel, supra; Auchenbach *v.* P. & R. R. Co., supra. Moreover, it is the law that a violation of the Act need not be the sole efficient cause in order that an action may lie. So also the element of proximate cause is eliminated where concurrent acts of the employer and employee contribute to the injury. Spokane & Inland E. R. Co. *v.* Campbell, 241 U. S. 497, 510, 36 S. Ct. 683, 60 L. Ed. 1125; Pless *v.* N. Y. Central R. R. Co., 189 App. Div. 261, 179 N. Y. S. 578, affirmed, 232 N. Y. 523, 134 N. E. 555. In this situation, where there was nothing to show that the plaintiff's contributory negligence, if any, was other than negligent concurrent with that of the defendant, it follows that an issue of the plaintiff's contributory negligence with its underlying issue of proximate cause was eliminated from the case and, in consequence, evidence to prove it was properly rejected" (16 F. (2d) 551, 552).

Eglsaer v. *Scandrett*, 151 F. (2d) 562, 565, 566 (7 C. C. A., October 25, 1945), was an action brought under the Federal Employers' Liability Act for the death of plaintiff's decedent, a railroad engineer. The evidence disclosed that while the train stopped deceased decided to repair the automatic bell ringer which had ceased to function automatically. He climbed out of the cab onto the catwalk on the right side of the engine. When the train was ready to proceed it was discovered that he was on the ground on the left side of the cab unconscious. The jury's verdict was special, it found that the automatic bell ringer was in a defective condition, and that the failure to provide such ringer in good condition was a cause of the death. The trial court changed the jury's verdict on the issue of cause, holding that there was no evidence to support a finding of violation of the Boiler Inspection Act by defendant contributing as a cause of death. The Circuit Court reversed, holding that the evidence was sufficient to support a finding that the carrier's violation of the Federal Safety Appliance Act was "in part" the cause of the engineer's death. The discussion of the Court is set forth for convenience in footnote.[4]

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[4] "* * * it seems clear, in the light of the provisions above abstracted, that the liability statute definitely recognizes the complex causal basis of most injuries, and, in effect, states that if, among the several factors which have combined to produce an injury within the purview of the statute, there shall be found *any negligent act or omission on the part of the carrier to which such injury was in part due, then liability for such injury shall fall upon the carrier.*'

"'The statute does not attempt to legislate upon the purely logical problem of determining the cause or causes of injury, but directs its mandate towards the problem of fixing liability for the injury. Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an Act of God, or pure accident, or from a combination of any or all of these factors. But after logic has thus determined the causal basis of the injury, the statute steps in to say that if, among these causes, there is negligence on the part of the employer, as that term is understood in the act, liability of the employer shall follow,

In *McCarthy* v. *Pennsylvania R. Co.*, 156 F. (2d) 877 (7 C. C. A., 1946), Cert. Den. 329 U. S. 812, 67 S. Ct. 635, a defective locomotive caused injury to the engineer operating it. The condition of the engine had been called to the attention of the engineer several times and he had been advised to take it out of service before it broke down. There was adequate opportunity for an exchange of engines. Decedent ignored the warnings and continued to operate the engine until it derailed, turned over and killed him. The court, following *Spokane & Inland Empire R. Co. v. Campbell, supra,* held that the engineer's conduct was nothing more than contributory negligence or assumption of risk, neither of which barred recovery against the carrier.

The Utah Court not only reaches an erroneous result,

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irrespective of the other factors causally related in whole or in part from negligence, even if the negligence of the injured employee or some other factor was logically nearer to, or more influential in producing that injury. In the words of Mr. Justice Holmes: 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.'

"There have recently been before the Supreme Court two cases in which the evidence of alleged negligence of a railroad was deemed by the Circuit Court of Appeals to have been insufficient to warrant a verdict for the plaintiff. In the one, Tiller v. Atlantic Coast Line, 323 U. S. 574, 65 S. Ct. 421, the Supreme Court, without extended discussion, held that the District Court properly submitted to the jury the issues of lack of light and lack of warning as possible proximate causes of the injury. In the other case, Tennant v. Peoria & Pekin R. Co., 321 U. S. 29, 64 S. Ct. 409, 412, 88 L. Ed. 520, a case which arose from this court, the Supreme Court held the evidence sustained a jury's finding that failure to ring the bell before starting a locomotive was negligence on the part of the railroad and that such negligence was the proximate cause of the death.

. . . . . .

"Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from

but its reasoning is in conflict with the reasoning found in every case we have examined. The Utah Court has even misapplied the sole authority it relied upon. It is submitted that a proper application of Sec. 433 of the American Law Institute Restatement of the Law of Torts would necessarily require a reversal of the Utah Court's decision. Without the support of the Restatement, the decision lacks both authority and reason. Petitioner's position is fortified by the cogent dissenting opinion of Justice Wolfe and his analysis of the causative elements in this case.

Point III

In eliminating respondent's admitted violation of the Federal Safety Appliance Act as a causative factor and determining the cause of Lucus' death as a matter of law, the Utah courts have usurped the functions of the jury.

There can be little doubt at this late date of this Court's intentions in regard to the right of a plaintiff to jury trial in cases brought under the Federal Employers' Liability

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a defective electric bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence 'in part' results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,'—if the injury or death resulted 'in part' from defendant's negligence, there is liability.

"The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident (151 F. (2d) 565, 566).

Act. In *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, where the question was whether the failure to give warning of the intended movement of a train could be found by the jury to be a cause of Tennant's death, this Court said (321 U. S. 34, 64 S. Ct. 412):

> "* * * The ultimate inference that Tennant would not have been killed *but for* the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable 'for * * * death resulting in whole or in part from the negligence of any of the * * * employees.'" (Italics added.)

In the much cited case of *Bailey* v. *Central Vt. R. Co.*, 319 U. S. 310, 87 L. Ed. 1444, 63 S. Ct. 1062, 1064, this Court, in discussing, reviewing and sustaining this right, stated:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob *v.* New York, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 852. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. *Reasonable care and cause and effect are as elusive here as in other fields.* But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. *To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.*" (Italics added.)

In the case of *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166, Mr. Justice Murphy, speaking for the Court, stated:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence, which is protected by the 7th amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the constitution or provided by statute, should be jealously guarded by the Courts."

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 451, 87 L. Ed. 610, this Court stated:

> "* * * Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones *v.* East Tennessee, etc., R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

In Footnote 30 of the *Tiller* case it is concluded:

> "It appears to be the clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury."

A jury could not ignore the substantial causative factor the unexpected stopping of the train played in causing the fatal accident. The unexpected stop was so obviously a cause of the collision that petitioner believes; under Sec. 53, Title 45, U. S. C. A. (Appendix "A"), he would have been entitled to a binding instruction on the matter of lia-

bility. But, even though the court might differ with us on this proposition, it is respectfully submitted that there can be no difference of opinion on the proposition that a jury question was presented by the evidence. By their rulings, the Utah courts have taken a case from the jury which is not close or doubtful, but a case wherein no conclusion seems possible other than that the charged and admitted violation of the Federal Safety Appliance Act by respondent contributed to the cause of the casualty complained of.

Causation is ordinarily a question for the jury. *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692; *Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528; *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751; *Spokane & Inland Empire R. Co.* v. *Campbell*, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125.

In this Court's most recent decision, *Doris Anderson, Admx. of the Estate of L. C. Bristow, deceased* v. *The Atchison, Topeka and Santa Fe Ry. Co.*, rendered April 26, 1948, not yet officially reported, but published in 16 L. W., reversing Supreme Court of California, 187 P. (2d) 729, it definitely and positively expressed its adherence to the rule protecting railroad employees in the full enjoyment of their right of trial by jury in actions arising under these Federal Acts:

> "* * * We are unable to agree that had petitioner been permitted to introduce all evidence relevant under her allegations, the facts would have revealed a situation as to which a jury under appropriate instructions could not have found that decedent's exposure and consequent death were due 'in whole or in part' to failure of respondent's agents to do what 'a reasonable and prudent man would ordinarily have done under the circumstances of the situation.' Tiller *v.* Atlantic Coast Line R. Co., 318 U. S. 54, 67. See also Jamison *v.* Encarnacion, 281 U. S. 635, 640, 641; Bailey *v.* Central

Vermont R. Co., 319 U. S. 350, 353; Blair *v.* Baltimore & O. R. Co., 323 U. S. 600, 604; Lillie v. Thompson, 332 U. S. 459, 461-462."

In the case of *Lillie* v. *Thompson*, 332 U. S. 459, 461-462, 68 S. Ct. 140, 142, cited in support of this Court's opinion in the *Anderson* case, *supra*, this Court reversed a judgment of the Sixth Circuit Court of Appeals dismissing the plaintiff's complaint (162 F. 2d 716), and in discussing the Circuit Court's holding that there was no causal connection between the injury and respondent's failure to light or guard the premises, wherein the petitioner, a young lady, was required to work in the nighttime, stated:

> "• • • That the foreseeable danger was from intention or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

The violation by respondent of the Act having substantially contributed to the cause of decedent's death, the question of causation was improperly withdrawn from the jury. The majority of the Utah Court thereby erroneously substituted its judgment for that of a jury and its error deprived petitioner of his constitutional right to a jury trial.

Conclusion

It is respectfully submitted that the opinion of the majority of the Supreme Court of Utah in this case is in conflict with the express provisions of the Federal Safety Appliance Act, the Federal Employers' Liability Act, and the controlling decisions of this Court and other Federal Courts construing those Acts; that a Writ of Certiorari should be granted in order for this Court to review the rec-

ord and the opinion of the Utah Court and finally reverse the same and remand the cause to the state courts for jury trial in accordance with the law.

Respectfully submitted,

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APPENDIX "A"

Section 1, Title 45, U. S. C. A.:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel-brake and appliances for operating the train-brake system or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

Section 8, Title 45, U. S. C. A.:

"The provisions and requirements of sections 1-7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of draw bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways."

Section 9, Title 45, U. S. C. A.:

"Whenever, as provided in sections 1-7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer

of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

Section 51, Title 45, U. S. C. A.:

"Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * *"

Section 53, Title 45, U. S. C. A.:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount

of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."